In the Supreme Court of the United States

October Term, 1979

No. 78-1487

Ford Motor Credit Company, *et al.*,
Petitioners,
v.
Dennis Milhollin, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the California Bankers Association As Amicus Curiae

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INDEX

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The California Bankers Association, pursuant to Rule 42 of the Rules of this Court and with the consent of all parties,[1] respectfully submits this brief *amicus curiae.* The Association urges that the judgments in these consolidated cases of the United States Court of Appeals for the Ninth Circuit be reversed.

1. Copies of the parties' consents to submission of this brief have been filed with the Clerk of this Court.

STATEMENT OF THE CASE AND INTEREST OF AMICUS CURIAE

In these cases, consolidated for decision below and for review in this Court, the Ninth Circuit upheld the conclusion of the District Court for the District of Oregon that, in connection with their consumer credit contracts with the respondent debtors, petitioners had violated the disclosure requirements of the Truth in Lending Act (the "Act"), 15 U.S.C. § 1638(a), and of the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.8(b), promulgated thereunder. In so doing, the Ninth Circuit reaffirmed its previous decision in *St. Germain v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977), that a creditor's acceleration of indebtedness upon default, although not among the credit terms specifically subject to disclosure under the Act or Regulation Z, is a "prepayment" within the meaning of Regulation Z, 12 C.F.R. § 226.8(b)(7). Accordingly, under the Ninth Circuit's ruling, creditors are obliged to include in the disclosure statement required by the Act a statement as to whether, in the event of acceleration, unearned finance charges will be rebated and, if so, how the amount of unearned finance charges will be computed. Failure to have made these disclosures will subject petitioners to the civil penalties imposed by the Act, costs of the action and attorneys' fees, without regard to whether their failure caused respondents any harm at all.

The California Bankers Association, a trade organization formed in 1891 to promote the study and discussion of commercial banking problems, includes among its members all but one of California's two hundred fifty-one commercial banks, ranging from among the nation's largest to small community banks. The Association's members all engage

in the extension of consumer credit.[2] In such transactions, each bank is subject to the Truth in Lending Act's requirements.

For the Association and its members, the primary significance of these cases does not lie in the particular Truth in Lending issue they present, *i.e.,* in whether, as a result of the Court's decision, Association members and other creditors will or will not have to include acceleration clauses in their Truth in Lending Act disclosures. The Association's members have no objection to making disclosure of acceleration clauses or, indeed, most other particular credit terms. The problem for the Association's members and, we believe, for all lenders who attempt in good faith to comply with the Act lies, rather, simply in knowing what must—and must not—be disclosed. The problem is exemplified by these cases. As petitioners have explained, both in their petition and in their opening brief to this Court, the Ninth Circuit's position on the acceleration clause issue —a position predicated on the court's interpretation of Regulation Z rather than on any purported conflict between the Regulation and the Truth in Lending Act itself—differs from the Federal Reserve Board's own interpretation of the Regulation, as expressed in Official Staff Interpretation No. FC-0054 [42 Fed. Reg. 18056 (March 21, 1977)] and Public Information Letter No. 1208 [(September 9, 1977), [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,696]. Moreover, the Ninth Circuit's position differs from the various positions taken on the issue by

2. As of June 30, 1978, the Association's members held over $16.6 billion of the $124 billion of outstanding consumer loans extended by the nation's commercial banks. FEDERAL DEPOSIT INSURANCE CORPORATION, ASSETS AND LIABILITIES, COMMERCIAL AND MUTUAL SAVINGS BANKS—JUNE 30, 1978, at 40-41 (1979); FED. RESERVE BULL., Jan. 1979, at A42, Table 1.55.

other Circuits, positions that themselves differ, in varying ways and degrees, from the position of the Board and, indeed, from each other.

The problem of conflict in identifying what credit terms are subject to Truth in Lending Act disclosure attaches not only to the acceleration clause issue presented here, but to other disclosure issues as well. The problem has impeded Truth in Lending compliance efforts throughout the Act's ten-year history. With the proliferation of Truth in Lending litigation and judicial decisions, the problem has assumed critical proportions, making compliance with the Act difficult, expensive, and uncertain. It has led, moreover, to a process of accretion in the information required to be disclosed, as judicial decisions add more and more terms to the required disclosure list. This process at once increases the difficulties of compliance and, at the same time, works to defeat the statutory goal of highlighting to the consumer those credit terms that have central significance to his credit purchasing decision.

The Court's decision in these cases presumably will resolve the conflict that now exists on the acceleration clause issue. But the Court's decision can, and in the Association's view should, be directed to ameliorating the general problems of conflict and accretion that have plagued compliance with the Truth in Lending Act from its inception. This Court cannot resolve every Truth in Lending conflict among the courts, and between the courts and the Federal Reserve Board. Even if it could, the delay before this Court could act would itself be attended by confusion and uncertainty as to what the Act requires. It has been, for instance, seven years since the first district court decision that acceleration disclosure was required; those seven years have been marked by confusion and by subjection of the credit-granting industry to numerous lawsuits on this single issue

alone. Accordingly, for the Association and its members, the critical significance of these cases lies in the opportunity they present the Court to articulate a standard of review in Truth in Lending cases that will, in the future, assist in preventing the proliferation of uncertainty about what the Act requires.

General judicial review principles, which this Court already has applied to Truth in Lending Act adjudication in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973), properly compel the courts to accede, in Truth in Lending Act civil enforcement actions, to the Federal Reserve Board's judgments as to the scope and content of required disclosure, unless the interpretations are plainly erroneous because contrary to Congress's intent. This standard of review finds support not only in administrative law principles, but in the Congressional purposes evinced in the Act's legislative history and in the need for uniformity both to achieve the Act's purposes and to avoid unfairness to those subject to it. To inform the Court of these general problems and of the necessity of strict deference to Federal Reserve Board judgments, the Association respectfully submits this brief. Because the Ninth Circuit failed to pay the required deference to the Board's interpretation of Regulation Z, the Association believes that the judgments below should be reserved.

SUMMARY OF ARGUMENT

The Truth in Lending Act's purpose is, in concept, straightforward. Congress's intent was to foster consumer awareness of the most significant terms of credit contracts, thus helping both to ensure that consumers will make informed decisions before incurring credit obligations and to allow consumers more readily to judge between compet-

ing credit offers. This intent is expressed in the statute itself:

> It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . .

15 U.S.C. § 1601.[3] To achieve these objectives, the Act requires creditors to disclose formally, in a statement given the consumer, certain specific terms in the underlying credit contract—in particular, those expressing basic price or principal, finance and other charges, and the finance charge expressed as an annual percentage rate. To ensure compliance with the Act, Congress provided that failure to make the required disclosures would render the creditor liable to the consumer for actual damages, if any, for the costs of suit, including attorney's fees, and for civil penalties of up to $1,000 in an individual action and $500,000 in a class action, without regard to whether, as a result of the failure, the consumer was in fact unaware of the credit terms or suffered any specific injury. 15 U.S.C. § 1640.

Congress recognized, however, that the purposes of the Act, although straightforward in concept, would be difficult in execution, given the myriad forms in which credit transactions can take place and the multitude of credit terms that arguably have some bearing on credit costs and on the consumer's decision. In addition, Congress recognized that the Act's purposes could be achieved only if the disclosures it required could be, across the universe of consumer credit transactions, both uniform and uniformly

3. *See* H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967), *reprinted in* [1968] U.S. Code Cong. & Ad. News 1970.

focused on the most critically significant credit terms. H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967), *reprinted in* [1968] U.S. Code Cong. & Ad. News 1970. For these reasons, Congress relied, in Section 105 of the Act, on the expertise of the Federal Reserve Board to create a detailed regulatory regime to achieve the Act's purposes. 15 U.S.C. § 1604.

Despite this, however, and despite this Court's recognition in *Mourning v. Family Publications Service, Inc., supra*, of the centrality of the Board's role in the scheme of the Act, the history of the Act's enforcement has been marked by conflicts as to what disclosures are required—conflicts that result in confusion, unfairness to creditors, and the substantial defeat of the Act's central objectives. Part I below details a part of this history, together with the consequent problems of compliance it has posed for creditors. This history demonstrates the necessity of returning to the administrative law principle recognized by this Court in the *Mourning* case. In brief, as Part II below explains, fair and efficient enforcement of the Act requires that courts defer to the Federal Reserve Board's judgments, expressed in Regulation Z and in Board and staff interpretations, as to the precise scope of the Act's disclosure obligations, unless the Board's judgments are plainly erroneous because in clear and direct conflict with demonstrable Congressional intent.

ARGUMENT

I. By Refusing to Defer to Federal Reserve Board Interpretations, the Courts Have Substantially Contributed to the Difficulties and Costs of Truth in Lending Compliance.

A. THE ACT IS COMPLEX AND THE CONSEQUENCES OF NON-COMPLIANCE ARE SEVERE.

The problems creditors have faced in complying with the Truth in Lending Act are founded in substantial measure

on the inevitable complexity, in application, of the law itself and of its implementing regulations. The credit contract, of course, contains all of the terms of the relationship between the creditor and the consumer. Regulation Z requires, however, that the specific terms that are to be disclosed must appear together on the same side of a single page. 12 C.F.R. § 226.8(a). Accordingly, creditors must carefully choose which of the many terms in a multi-page contract are to be extracted from the contract and placed together on the single page that includes the federal disclosure statement. To preserve logical continuity in the contract itself, consumers may actually have key contract terms disclosed to them twice, once in the formal disclosure, again in the body of the contract. In addition to such locational requirements, Regulation Z imposes highly detailed substantive requirements (*see, e.g.,* 12 C.F.R. § 226.8(e)), mandatory vocabulary for identification of credit terms (*see, e.g.,* 12 C.F.R. § 226.8(c)), and even requirements for the size of type in which the terms are to be printed (12 C.F.R. § 226.6(a)).

Any variance from or technical violation of the elaborate requirements of the Act and of Regulation Z can result in a debtor's invocation of the statutory penalties. Indeed, the penalties have been applied even when the creditor's departure from the requirements has been evidently trivial.[4] Moreover, since lenders almost universally use

4. *See, e.g., Houston v. Atlanta Federal Sav. & Loan Ass'n.,* 414 F. Supp. 851, 858 (N.D. Ga. 1976), in which the court found that the creditor's failure to fill in the borrower's city and state of residence in the disclosure statement was a violation of Regulation Z; *Powers v. Sims and Levin Realtors,* 396 F. Supp. 12, 19 (E.D. Va. 1975), *aff'd on other grounds,* 542 F.2d 1216 (4th Cir. 1976), in which the use of the term "total finance charges" instead of the required "finance charge" was held to be a violation of Regulation Z. *See also Ratner v. Chemical Bank New York Trust Co.,* 54 F.R.D. 412, 416 (S.D. N.Y. 1972).

preprinted forms, a single court decision finding a form in noncompliance has the practical effect of exposing the creditor to liability on each of its outstanding consumer loans, possibly numbering in the thousands.[5]

This potential liability is more than theoretical. Since 1972, more than 11,500 Truth in Lending actions have been filed in federal courts.[6] Because a claim can be made, and penalties recovered, without regard to whether the alleged violation caused the debtor any harm, few of the cases have involved debtors who were dissatisfied either with the disclosure provided them or even with the terms of the credit; indeed, it appears that, in many of the cases, Truth in Lending claims were filed to avoid the obligations of the debt or to force resolution of a dispute concerning the products or services purchased with the credit. Landers, *Some Reflections on Truth in Lending,* 1977 U. ILL. L. FORUM 669, 677. Moreover, the enormous volume of Truth in Lending suits substantially understates the effect that potential liability has had on creditors. The potential expense of litigation and of possible penalties and counsel's fees, multiplied by the threat of class actions, almost certainly has resulted in creditors choosing to settle thousands of additional claims before suits were filed. Landers, *supra,*

5. If individual actions are brought, the lender might be required to pay the statutory penalty in each, with maximum potential liability limited only by the number of such possible actions. The Act limits maximum class action recoveries to the lesser of $500,000 or one percent of the creditor's net worth. 15 U.S.C. § 1640(a)(2)(B).

6. WASHINGTON CREDIT LETTER, Nov. 13, 1978, at 3. At one juncture, in 1974, Truth in Lending actions made up 36.8% of all cases filed in the Northern District of Georgia. *Qui Tam and Federal Reserve Board Procedures: Hearings on S.3008 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs,* 94th Cong., 2nd Sess. 416 (1976) (statement of W. Rhett Tanner, Jr.).

at 680-81. *See Mirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir.), *cert. denied*, 99 S. Ct. 642 (1978).

The problems of compliance, in short, have generated substantial costs—costs that creditors inevitably must pass through, at least in part, to the public. To a substantial extent, as noted above, these costs result from the complexity of Truth in Lending Act requirements and from the rule of strict liability the Act creates. But to an equally substantial extent, the costs result from the uncertainty of the law, an uncertainty to which the courts have been prime contributors.

B. JUDICIAL DECISIONS HAVE UNDERCUT CONGRESS'S AND THE FEDERAL RESERVE BOARD'S EFFORTS TO ACHIEVE CLARITY AND UNIFORMITY IN THE LAW.

From the earliest days following passage of the Act, the Federal Reserve Board took affirmative steps to carry out the Congressional directive that it facilitate Truth in Lending compliance. In particular, the Board established an elaborate system to provide advisory letters and staff interpretations attempting to clarify compliance technicalities. Since 1968, the Board has issued 58 official Board interpretations of the Act and Regulation Z, 166 official staff interpretations and more than 1,300 public information letters. These promulgations in themselves have added complexity to the law. But through them the Board has attempted to foster an ingredient essential to effective enforcement and compliance—certainty as to the law's requirements. Through these various devices, the Board has attempted to address Truth in Lending issues from a national perspective, and to allow lenders to secure direction in areas of potential doubt. The Board's efforts have been an integral part of a national and uniform compliance system.

This system, however, is suffering significantly from a steady erosion caused by judicial opinions that have both added requirements to the Act and contradicted Board promulgations. In adjudicating debtors' Truth in Lending claims the courts have varied significantly in the degree of deference given Board or Board staff interpretations. Staff interpretations, for example, have been termed merely "persuasive," *Lipson v. Burlington Savings Bank*, 428 F. Supp. 1073, 1078 (D.Vt. 1977). Other courts have said that they deserve "respect," *Griffith v. Superior Ford*, 577 F.2d 455, 458 (8th Cir. 1978); plain "deference," *McDaniel v. Fulton National Bank*, 571 F.2d 948, 950 (5th Cir.), *reh. denied with explanatory opinion*, 576 F.2d 1156 (5th Cir.), *panel opinion after remand*, 578 F.2d 1185 (5th Cir. 1978); "great weight," *Anthony v. Commercial Loan & Investment Corp.*, 559 F.2d 1363, 1367 (5th Cir. 1977); and, finally, "great deference," *Philbeck v. Timmens Chevrolet*, 499 F.2d 971, 977 (5th Cir. 1974). As a result of these varied and often loose standards of deference, courts frequently have resolved Truth in Lending issues contrary to apparently clear Board and staff directives. Apart from making the Board's interpretations unreliable indicators of what is required, the courts have also made the Board's list of disclosure obligations incomplete, adding new terms to the list of those that, under the Board's directives, are the only terms that must be disclosed.

The acceleration issue presented in these cases exemplifies both processes—uncertainty and accretion—at work. Prior to the decision in *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972), no reasonable creditor could have concluded that the Truth in Lending Act required inclusion, in the Truth in Lending disclosure statement, of acceleration clauses or of the possible consequences

of acceleration on the amount of finance charges paid. Nowhere in the Act or Regulation Z were acceleration clauses even mentioned, much less was there any requirement regarding their disclosure. Yet, beginning with *Garza,* some courts have managed to create, from the language of the Act or Regulation Z, some basis for including acceleration clause information among the required disclosures, and, concomitantly, have found lenders liable for having failed to predict the courts' creativity on the issue. Other courts, however, have taken the position that disclosure is required only of those credit terms specifically listed in the statute and regulation, and, accordingly, have refused to include acceleration clauses among the Act's disclosure obligations. *E.g., Griffith v. Superior Ford,* 577 F.2d 455 (8th Cir. 1977); *Begay v. Ziems Motor Co.,* 550 F.2d 1244 (10th Cir. 1977). In 1974, the Federal Reserve Board broke its previous silence on the subject. The Board staff indicated that the law required the creditor to disclose the acceleration clause only if the creditor did not rebate unearned finance charges in accordance with rebate provisions applicable to other prepayments. Federal Reserve Board Public Information Letter No. 851 (Oct. 22, 1974), [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,173. Subsequently, some courts have adopted the staff's interpretation; others, including the Ninth Circuit here, have not. In consequence, for the last seven years, lenders have had no single rule to follow on this issue.

The accretion in the disclosure requirements resulting from imaginative judicial interpretations is by no means unique to the acceleration issue. Examples are numerous. Indeed, the proliferation of uncertainty as to the proper

disclosure of security interests, for instance, is, if anything, even more severe. The requirements of Regulation Z with respect to security interests are, on their face, simple enough. The creditor is required to disclose the type of security interest, the property to which it relates, whether after-acquired property will be subject to the interest, and whether other or future indebtedness is to be secured. 12 C.F.R. § 226.8(b)(5). But despite the Regulation's relatively limited and straightforward disclosure obligations, some courts have required additional, increasingly sophisticated and complex disclosures, incuding (1) the limitation under Uniform Commercial Code Section 9-204[7] on security interests in after-acquired consumer goods,[8] and (2) any waiver of homestead exemptions.[9] In adding complexity to the security interest disclosure requirements, the courts once again have not paid sufficient deference to the position of the Federal Reserve Board and its staff on the issue of what constitutes sufficient disclosure.

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7. The Uniform Commercial Code has been adopted in forty-nine states.

8. *Basham v. Finance American Corp.*, 583 F.2d 918 (7th Cir.) *cert. denied,* 99 S.Ct. 1046 (1978); *Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *cert. denied,* 434 U.S. 891 (1977). *Contra, Interlakes Financial Corp. v. Payne,* 401 N.Y.S.2d 713 (1978); *In re Dickson.* 432 F. Supp. 752 (W.D.N.C. 1977). Federal Reserve Board Public Information Letter No. 1053 (May 28, 1976), [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,393; Federal Reserve Board Public Information Letter No. 983 (Dec. 30, 1975), [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,323.

9. *Lamar v. American Finance System of Fulton County, Inc.*, 577 F.2d 953 (5th Cir. 1978); *Elzea v. Nat'l Bank of Georgia,* 570 F.2d 1248 (5th Cir. 1978).

C. THE COURT'S DECISIONS IMPAIR THE EFFECTIVENESS OF THE ACT AND CONTRIBUTE SUBSTANTIALLY TO THE DIFFICULTIES OF COMPLIANCE.

The process of accretion that the acceleration clause and security interest cases exemplify goes a substantial way toward defeating a central purpose of the Truth in Lending Act. Some courts, viewing each purported failure to disclose in isolation, see the nondisclosed term as having possible significance to consumer decisions—as almost all credit terms, in some circumstances, do—and accordingly conclude that it would be desirable to include it in the disclosure.[10] In so acting, the courts fail to appreciate that Congress intentionally limited the disclosure requirements of the Act, and that the limitation was essential to the Act's purpose: to provide consumers with clear, conspicuous disclosure of specifically selected, especially significant, credit terms in order to promote intelligent consumer choice. The judicial decisions result, through the accumulation of new requirements, in a radically different approach, in effect requiring disclosure of "all relevant factors" rather than specific terms of particular significance. *See* Landers, *supra,* at 674. Far from contributing to intelligent choice, the prolixity of the disclosure may result in an "information overload," substantially defeating Congress's aim. Senator William Proxmire, a sponsor of the original Act and of major pending Truth in Lending Act amendments, has observed that "[d]isclosure statements have grown increasingly detailed to a point where, instead of being concise and understandable, they are liable to be 2 feet long." 123 CONG. REC. S6020

10. Most frequently, the courts have devised different disclosure requirements by interpreting specific existing disclosure requirements. Some courts have gone so far as to simply find that the general purposes of the Act require an additional disclosure. *See, e.g., Woods v. Beneficial Finance Co.,* 395 F. Supp. 9 (D. Ore. 1975).

(daily ed. Apr. 20, 1977).[11] Governor Philip Jackson, at the time Chairman of the Board's Consumer Affairs Committee, recently testified to the effect that a reduction of disclosures was important to focus consumer attention and achieve the purpose of the Act.[12]

The conflicts among the varying interpretations of the courts and the Board that accompany this process of accretion also impair the Act's effectiveness. Creditors preparing Truth in Lending statements must, in a never-ending process, continually evaluate the decisions of hundreds of district courts and the courts of appeals in eleven different circuits, state court decisions, as well as hundreds of Federal Reserve Board and Board staff interpretations. As a practical matter they must respond with alterations in disclosure patterns whenever any of these sources so dictates. Absent a single source of guidance, the creditor is harmed, as is the consumer, since the statutory goal of uniformity in presentation, allowing ready consumer comparison of significant credit terms, is lost.

For the creditor, the process of accretion and the confusion in interpretation have significant costs even apart from the potential liabilities they create. Continually monitoring the multiple sources of authority for each highly technical change is in itself enormously expensive; it requires the

11. The "information overload" problem, among other factors, has generated congressional efforts to simplify the Act's requirements. *See* S. 108, 96th Cong., 1st Sess. The Senate passed the bill on May 1, 1979. 125 CONG. REC. S4990 (daily ed. May 1, 1979). In his remarks, Senator Garn observed that "disclosure forms had become too lengthy and complex for consumer understanding or utility." *Id.* S4989.

12. *Simplify and Reform the Truth in Lending Act: Hearings on S. 1312, S. 1501, and S. 1653 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs,* 95th Cong., 1st Sess. 16-17 (1977) (statement of Philip C. Jackson, Governor, Board of Governors of the Federal Reserve System).

services of professionals who are highly trained in this narrow and complex field. The frequency and cost of change are great. One national creditor—General Motors Acceptance Corporation—estimated that it alone made more than 1,400 amendments to its disclosure forms between 1968 and 1977.[13] With each judical addition to the disclosure list, forms prepared in compliance with old requirements must be discarded and new forms printed; a single such change, made to comply with the new requirement of a single court of appeals in credit transactions throughout the circuit, can cost several million dollars.[14] The costs to society, in short, are immense.

The judicially produced transformation of the system envisaged by Congress affects all creditors, but its impact on the thousands of small banks and credit unions throughout the United States is especially severe. They are without the resources to comply. The volume and value of transactions in which they engage are too small in comparison with those of their larger competitors to absorb the high fixed cost of compliance. They are placed in a double bind: they must either incur what may be ruinous costs of compliance, or risk the consequences of ruinous liability if they do not.

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13. General Motors Acceptance Corp. has testified before Congress that since the effective date of the Truth in Lending Act and Regulation Z, the company has spent more than $3 million to accomplish these form changes. *Oversight Hearings on the Simplification of the Truth in Lending Act Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs,* 95th Cong., 2d Sess. 558 (1978) (statement of General Motors Acceptance Corp.).

14. According to Robert Evans, general counsel to the National Consumer Finance Association, one circuit decision engrafting a new requirement onto Regulation Z can cost between $3 million and $6 million. *Hearings, supra* note 13 at 217.

Finally, even creditors who can afford to keep abreast of changing requirements face a serious dilemma. In normal circumstances, persons subject to evolving legal requirements can, with advice of counsel, attempt to minimize risk by going beyond what the law appears at present to require; they can attempt, in short, to predict what might be required in the future and then act on their prediction. But in the Truth in Lending area, this course itself poses substantial risks. Voluntary change, when the law is unclear, may suggest to potential litigants that past practices were in violation. Even more importantly, too much disclosure can itself be a violation of the Act and of Regulation Z. 12 C.F.R. § 226.6(c). Accordingly, if a creditor discloses information apart from that required by existing regulations and court decisions, he may be found liable if, in the end, a court determines that such disclosure was not mandated and that the "over-disclosure" may contribute to consumer confusion. *See, e.g., La Grone v. Johnson,* 534 F.2d 1360, 1362 (9th Cir. 1976).

D. THE PROBLEMS OF COMPLIANCE REMAIN DESPITE CONGRESS'S EFFORTS TO PROMOTE FAIRNESS AND UNIFORMITY IN THE ACT'S ENFORCEMENT.

In amendments to the Act, Congress has attempted to address some of the problems of compliance described above. Thus, in 1974, Congress added to the Act a new Section 130(f), providing that no liability would attach

> to any act done or omitted in good faith in conformity with any rule, regulation or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Pub. L. No. 93-495, § 406, 88 Stat. 1518 (1974). In so amending the Act, Congress intended to relieve creditors from liability for following official Board decisions with which courts subsequently disagreed:

> The Truth in Lending Act is highly technical and the committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.

S. Rep. No. 279, 93rd Cong., 1st Sess. 13 (1973).

The "good faith" defense of the 1974 amendments applied, however, only to reliance on Regulation Z itself or on official Board decisions. The defense did not apply to reliance on staff opinions and interpretations, even though they have been the primary means through which the Board has tried to promote clarity in the requirements of the law. In 1976, in response to requests by creditors unable to discern how to comply with the Act,[15] Congress amended Section 130 (f) to provide that no liability would apply if the creditor acted in good faith and

> in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor . . . .

15 U.S.C. § 1640(f).[16]

15. *See* 122 Cong. Rec. 2852 (1976) (remarks of Rep. Annunzio).

16. One of the driving forces behind the amendments was the concern over small business compliance. As stated by Congressman Wylie:

> This provision should be especially helpful to small businesses, which cannot afford that expensive legal talent which is often required to enable them to cope with the intricacies of this Act.

122 Cong. Rec. 2852 (1976). A similar concern was expressed in the Senate, 122 Cong. Rec. 2836 (1976) (remarks of Sen. Garn).

Thus, Congress has attempted to facilitate compliance by allowing creditors a defense if they rely in good faith on either Board or staff interpretations, even if the courts subsequently find the interpretations invalid. But Congress's efforts, important as they are in furthering clarity of the law and effective, uniform compliance, leave creditors open to continuing risk in Truth in Lending cases. The 1974 and 1976 amendments provide no protection, for example, from a court ruling that adds a new disclosure requirement to those previously articulated by the Board, unless the Board (or staff) expressly has stated that such disclosure is *not* required.[17] The Board most frequently states positively what must be disclosed, rarely what need not be disclosed. Moreover, courts can continue to find Board and staff interpretations wrong. If so, the creditor before the court may invoke the good faith defense. But it is unclear whether other creditors, in subsequent credit transactions, can continue to rely "in good faith" on a Board interpretation found, by some court somewhere, to be erroneous. No court, to our knowledge, has yet ruled on this point, and, accordingly, the confusion resulting from conflicting court and board interpretations continues to impair both creditor compliance and the Act's effectiveness.

II. Courts Should Adhere to the Board's Interpretations of Both the Scope and the Content of the Act's Requirements Unless Clearly Contrary to Congressional Intent.

The Association believes that the impediments, described above, to compliance with and effective implementation of

17. *See, e.g., Jones v. Community Loan & Investment Corp.*, 526 F.2d 642 (5th Cir.), *rev'd*, 544 F.2d 1228 (5th Cir. 1976) (*en banc*), *cert. denied*, 431 U.S. 934 (1977). *See also, St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977); *Pollock v. General Finance Corp.*, 552 F.2d 1142, 1144 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Ives v. W. T. Grant Co.*, 522 F.2d 749, 758 (2d Cir. 1975).

the Truth in Lending Act could have been diminished substantially had the courts, including the Ninth Circuit in these cases, paid proper deference to the decisions of the Federal Reserve Board. In adjudicating Truth in Lending cases, creditors should be held liable only if their disclosure statements fail to comply with the specific terms of Regulation Z and with interpretations of the Regulation by the Board and its staff, unless either the Regulation or the Board's interpretation of it is plainly erroneous because manifestly contrary to the intent of Congress. Indeed, in the *Mourning* case, this Court already has recognized such a role as consistent with that Congress intended the Board to play, with the judicial review principles that follow from it, and with fair and effective achievement of the Act's goals.

A. CONGRESS INTENDED THAT THE BOARD ACT AS THE SOURCE OF UNIFORM INTERPRETATION OF THE ACT'S REQUIREMENTS.

In *Mourning v. Family Publications Service, Inc.,* this Court's only previous Truth in Lending case, the Court gave full recognition to the central role Congress gave the Federal Reserve Board in order to achieve the Act's remedial purposes. At issue in *Mourning* was the Board's "four installment rule," which made the Act's disclosure requirements applicable to any obligation payable in more than four installments, and thus significantly expanded the Act's express coverage. The Court stated that Section 105, delegating rulemaking authority to the Board, gave the Board "broad authority . . . to render the Act effective." 411 U.S. at 365.

The broad authority of Section 105 was intended, however, not only to deal with the kind of "attempted evasion" at issue in *Mourning*, but to achieve other purposes as well. In particular, the legislative history demonstrates that Congress delegated authority to the Board in order to

achieve uniformity in the Act's application. Thus, the Conference Report focused on uniform application of the Act's requirements to all competitors in the highly fragmented credit industry and stated that, to achieve this end, the Act would vest "sole rulemaking power . . . in the Board of Governors . . . ." CONF. REP. No. 1397, 90th Cong., 2d Sess. 26 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2023. The Act itself makes it clear that uniformity is essential to the Act's purpose; disclosure was to be in a uniform format, using a uniform vocabulary and uniform computational methods, "so that the consumer will be able to compare more readily the various credit terms available to him . . . ." 15 U.S.C. § 1601.

Moreover, as explained in detail above, the central role of the Board was, in Congress's view, essential to allow creditors readily to comply with the Act, and to make it possible fairly to impose the stringent statutory penalties for noncompliance. This Court, in *Mourning,* recognized the force of this point. The Court rejected an attack based on the "penal" consequences of the Board's rule, in part, at least, because the rule was "explicit" and so gave clear warning of what was required. 411 U.S. at 375. In the 1974 and 1976 amendments to the Act, Congress reinforced the central role it intended the Board to play. Generated by Congress's concern over the confusion evident in the courts' development of Truth in Lending Act requirements, the purpose of the amendments was to give "binding" force to the interpretations of the Board and its staff. *See, e.g.,* 122 CONG. REC. 2836-37 (1976) (remarks of Senators Proxmire and Garn). The amendments' legislative history thus reaffirms Congress's original intent that the Board and its staff be looked to as the source of nationally uniform standards of Truth in Lending disclosure requirements.

B. ACHIEVEMENT OF THE ACT'S PURPOSES REQUIRES THAT COURTS ADHERE TO THE DEFINITION OF THE ACT'S REQUIREMENTS AS FORMULATED BY THE BOARD AND ITS STAFF.

To fulfill the role Congress assigned it under the Truth in Lending Act, the Federal Reserve Board exercises its formal rulemaking authority in amendments to Regulation Z. In addition, both the Board and its staff issue interpretations as to what, in particular circumstances, the Act and the Regulation require.

In reviewing a Federal Communications Commission rule, which raised much broader policy issues than those entailed in determining whether any particular credit term should be disclosed, this Court reaffirmed the

> venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969). *Accord, Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977). Although using a somewhat different verbal formulation, this Court more recently described the standard of review in terms of reasonableness; that is, if the agency construction of a statute through rulemaking is not unreasonable, it should not be disturbed on review. *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450-51, 455 (1978). *See American Trucking Association, Inc., v. United States,* 344 U.S. 298, 313-14 (1953). An administrative agency's construction of its own regulation is entitled to even greater deference; indeed, this Court has held that such construction has controlling weight unless it is "plainly erroneous" when compared to the regulation. *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 413-14 (1945).

In the *Mourning* case, the Court emphatically applied these principles to the Board's rulemaking function under the Truth in Lending Act. In rejecting the respondent's contention that the "four installment rule" was unduly harsh, the Court stated:

> That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed judgment of the agency to whom Congress delegated authority.

411 U.S. at 371-72.

The Court went beyond this to recognize, at least implicitly, that staff interpretations of creditor obligations under Regulation Z have controlling force. In stating that, under the rule, not all creditors within the rule's ambit need disclose a finance charge or annual percentage rate, the Court referred to a Board Advisory Letter and to a letter of a Board staff member. 411 U.S. at 377 n.42. The Court thus treated the letters as, in effect, controlling law as to what disclosures creditors who do not assess finance charges must make, and, by implication, indicated that creditors generally should be able to rely on other, similar Board and staff interpretations.

The ability so to rely on affirmatively stated requirements is critical to the proper functioning of the Act as well as to fairness to creditors. But it is equally critical that creditors be able to rely on the absence of any specific disclosure requirement promulgated by the Board. The Board, through Regulation Z and through formal interpretations by itself and by its staff, has carefully identified, explicitly and in great detail, the disclosures creditors must make. The Board has thus exercised its affirmative duty under the Act

to specify those particularly significant credit terms that must be disclosed, and has decided, by implication, that other terms need not be included, even though they appear in the credit contract. If the Board has not specifically identified a term as subject to disclosure, the courts should not infer that the Board was indifferent to the problem or simply had not thought of it. On the contrary, the Board's silence should be taken as conclusive that disclosure is *not* required.

Any other approach engenders the problems of accretion and attendant confusion that, as described above, have plagued the Truth in Lending Act throughout the decade of its history. Indeed, any other approach would require the Board explicitly to reject inclusion of each and every credit term which it arguably could have included, but did not include, among the limited list of significant terms that must be disclosed.

Some courts already have adopted the approach advocated here. Thus, in considering the acceleration clause issue, the Eighth Circuit stated:

> Defendants' disclosure statement fully complies with the Act and Regulation Z in describing the method of rebate in the event of prepayment. Regulation Z, fairly read, requires only the disclosure of the consequences of *prepayment,* not the effect of the exercise of a right to accelerate. In our judgment, no such additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board.

Griffith v. Superior Ford, 577 F.2d 455, 460 (8th Cir. 1978). *Accord, Croysdale v. Franklin Savings Association,* No. 78-1364 (7th Cir. July 12, 1979).

This Court's adoption of the foregoing approach in these cases, to reverse the Ninth Circuit's judgments, would contribute substantially to achievement of the Truth in Lending Act's purposes, at once affording debtors the protection Congress intended and greatly facilitating creditor efforts to comply with what would be relatively clear and uniform disclosure standards. This is not to say that the substance of Truth in Lending disclosure has been or will be frozen. Congress has amended the disclosure provisions of the Act in the past [Pub. L. No. 93-495, Tit. IV, 88 Stat. 1517 (1974)] and has had pending before it in the 95th and 96th Congresses major substantive amendments.[18] Further, the Board has clearly demonstrated a willingness to reexamine Truth in Lending principles and to alter them where advisable. But it must be the Congress and the Federal Reserve Board that make changes. Only they can evaluate the impact of change on diverse creditors and diverse credit transactions, weigh proposed changes against goals with

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18. *See, e.g.,* S. 2802 and H.R.12158, 95th Cong., 2d Sess. (1978); S. 108, H.R. 1289, H.R. 3553 and H.R. 4270, 96th Cong., 1st Sess. It is interesting to note that, contrary to the trend of the judicial decisions, S. 108, which passed the U.S. Senate unanimously on May 1, 1979, *reduces* and simplifies the disclosure provided to consumers. S. 108, 96th Cong., 1st Sess. (1979), as passed by the Senate, 125 Cong. Rec. S4984-88 (daily ed. May 1, 1979). S. 108 and its predecessor, S. 2802 [S. 2802, 95th Cong., 2d Sess. (1978), as passed by the Senate, 124 Cong. Rec. S7233-38 (daily ed. May 10, 1978)], may be taken as some reflection of how accurately the Senate believes the judiciary has responded to Congressional intent.

which they are intimately familiar, and proceed to accomplish change in an orderly, prospective manner, with uniform national application.

CONCLUSION

Because the decision of the United States Court of Appeals for the Ninth Circuit added a Truth in Lending Act disclosure obligation beyond those that the Federal Reserve Board, in the exercise of its statutory authority, specifically has defined, the California Bankers Association respectfully submits that the judgments in these consolidated cases should be reversed.

Respectfully submitted,

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